DARSHAN SINGH KHAIRA

v.

ENBISHI (M) SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
AZMEL MAAMOR J
T SELVENTHIRANATHAN J
HASHIM YUSOF J
[CIVIL APPEAL NO: 17-5-1998]
13 NOVEMBER 1998

LEGAL PROFESSION: *Liability as officer of court - Duty to court - Non-disclosure by counsel of order granted in earlier proceeding which was material for consideration in later ex parte proceeding - Whether amounts to breach of duty to conduct case fairly and honestly - Whether amounts to misleading court - Legal Profession (Practice and Etiquette) Rules 1978, rr. 12, 16, 17 & 31*

LEGAL PROFESSION: *Professional discipline - Suitability of sentence - First offender suspended six months from practice for deliberately and knowingly breaching duty to conduct case fairly and honestly - Whether sentence excessive*

The appellant, an advocate and solicitor, appealed against an order of the Disciplinary Board suspending him from practice for a period of six months for (i) breaching his duty to be honest to the court; (ii) violating rr. 12, 16, 17 and 31 of the Legal Profession (Practice and Etiquette) Rules 1978; and (iii) conduct unbefitting of an advocate and solicitor. The appellant was the solicitor for one Alloy Automotive in two separate proceedings. In the first proceeding, the High Court made an order expunging, from the Register of Trade Marks, one "Enkei" trade mark registered in the name of Alloy Automotive. This notwithstanding, in a later *ex parte* proceeding, Alloy Automotive, again represented by the appellant, applied for and obtained a Trade Description Order for the same "Enkei" mark. The appellant did not, in the later *ex parte* proceeding, disclose the existence of the order made by the High Court in the first proceeding.

Held:
Per Azmel Maamor J

[1] The appellant, having been in the legal practice for a pretty long period, should have been fully aware that an advocate and solicitor, who is also an officer of the court, should at all times conduct his case fairly and honestly and should not at any time mislead the court. In the instant case,

the appellant had deliberately and knowingly failed to disclose the existence of the order of court given by the High Court in the first proceeding when he proceeded to apply for the later *ex parte* order. The *ex parte* order would not have been issued by the court had the appellant disclosed the existence of the earlier order.

[2] Although this was the appellant's first offence, the sentence of six months was not excessive. The appellant must be made to realise the consequences of his wrongful acts which were done deliberately and knowingly, more so as he was not new to the legal profession. Considering that the appellant's actions were not only wrongful and deliberate but had caused so much hardship to the respondents, the 6 months suspension may appear to be manifestly inadequate.

[Appeal dismissed.]

Legislation referred to:
Legal Profession (Practice and Etiquette) Rules 1978, rr. 12, 16, 17, 31

F*or the appellant - GG Yeap; M/s Darshan Singh & Co*
For the respondent - Lim Chee Wee; M/s Skrine & Co

Reported by S Dharmendran

JUDGMENT

Azmel Maamor J:

The appellant, an advocate and solicitor, had appealed against the order of the disciplinary board dated 28 February 1998 suspending him from practice as an advocate and solicitor of the High Court of Malaya for a period of six (6) months.

The facts of the case had been succinctly stated by the investigating tribunal in their report as found on pp. 97 to 99 of the appeal record. We unanimously accepted their finding of facts in toto as we found no grounds whatsoever not to agree with them. Based on the facts as found by the investigating tribunal we fully agreed that the appellant had committed violations of rr. 17 and 31 of the Legal Profession (Practice and Etiquette) Rules 1978 as well as rr. 12 and 16 of the same rules. For ease of reference we state below the findings of facts of the investigating tribunal.

> The appellant was at all material times the solicitor on record for Alloy Automative in both the proceedings, *vide*, Kuala Lumpur High Court Originating Motion No: D3-25-8-1994 and Kuala Lumpur High Court Originating Motion No: D2-25-2-1995 and had full knowledge of all developments in those two proceedings.

The "ENKEI" trade mark originally registered in the name Alloy Automotive had been expunged from the Register of Trade Marks by the Honourable Justice Dato' VC George by Order of Court dated 5 October 1994 in proceedings D3-25-8-1994 and therefore Alloy Automotive, as a matter of law, was not entitled to be the registered proprietor of the Trade Mark "ËNKEI".

The appellant who drew up all the papers and attended before the Honourable Mr Justice Richard Talalla on 30 January 1995 on the application in proceedings D2-25-2-1995 for a Trade Description Order (TDO), knowingly failed to set out or disclose the existence of the order of court made by Justice Dato' VC George on 5 October 1994 in D3-25-8-1994. It was singularly clear that the said order of 5 October 1994 was relevant and material for the consideration of the judge in considering the application for a TDO.

The appellant had not adduced any reasonable or satisfactory explanation for the suppression of this material fact from Mr Justice Talalla when he obtained the *Ex Parte* Order (TDO) on 30.1.1995.

The TDO was obtained by the appellant on 30 January 1995 on a premise which was false and incorrect in that after 5 October 1994 Alloy Automative could no longer claim to be entitled in law to be the registered owner of the ENKEI mark contrary to what was deposed to in para. 3 of the affidavit of Mr Yap Weng Yew in D2-25-2-1995.

The appellant had committed a misconduct under the Legal Professions Act, 1976 on the following counts:

(a) he had breached his duty to be honest at all times to the court in the discharge of his professional duties especially in pursuing an *Ex Parte* Order where the court did not have the benefit of the submissions of any interested party.

(b) he had violated rr. 17 and 31 of the Legal Profession (Practice and Etiquette) Rules, 1978 directly and rr. 12 and 16 of the same rules indirectly.

(c) he was guilty of a conduct which was unbefitting of an advocate and solicitor and which was calculated to bring the legal profession into disrepute.

On the basis of facts as found by the investigating tribunal we have no doubts whatsoever that the appellant had committed breaches of the said Rules of the Legal Practice (Practice and Etiquette) Rules 1978. The appellant who had been in the legal practice for a pretty long period should have been fully aware that as an advocate and solicitor who is also an officer of the court should at all times conduct his case fairly and honestly and should not at any time mislead the court. In this case he had deliberately and knowingly failed to disclose the existence of the order of court given by YA Dato' VC George

dated 5 October 1994, when he proceeded to apply for the *ex parte* order before YA Tuan Richard Talalla on 30 January 1995 which order was obtained by him. We had no doubt whatsoever that such order would not have been issued by YA Tuan Richard Talalla had the appellant disclosed the existence of the earlier order dated 5 October 1994 given by YA Dato' VC George. We therefore had no reason whatsoever to disturb the finding of guilt of the appellant by the investigating tribunal which was subsequently endorsed by the disciplinary board.

As to the sentence of suspension of six (6) months imposed by the disciplinary board we were unanimous in holding that the sentence was not excessive. While noting that this is his first offence, we were of the view that the appellant must be made to realise the consequences of his wrongful acts which were done deliberately and knowingly. He is not new to this legal profession. As such we also dismissed his appeal against sentence.

However, on hindsight we regretted for not asking the appellant to show cause why his suspension should not be increased to twelve (12) months having regard to the fact that his actions were not only wrongful and deliberate but had caused so much hardship to the respondents. Having regard to the wrongful and deliberate actions committed by him and the hardship that had been caused to the respondent the six months suspension may appear to be manifestly inadequate. We are of the view that this is an issue which the Higher Court may wish to consider. We use the term "Higher Court" having regard to the fact that the appellant had filed this appeal in the Federal Court. In our view it would be more appropriate that this appeal be filed in the Court of Appeal. The propriety of the Notice of Appeal of the appellant becomes an issue.